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SUBJECT: CANADIAN SUPREME COURT: GOVERNMENT CAN DECIDE ON KHADR

REF: 09 OTTAWA 629; 09 OTTAWA 313

¶1. (SBU) Summary: In a unanimous decision on January 29, the Supreme Court of Canada overturned an Appeals Court order that the Canadian government must request the repatriation of Canadian citizen Omar Khadr in Guantanamo Bay from U.S. authorities. However, the Supreme Court also ruled that the federal government had breached --and continues to breach -- Khadr's constitutional rights, while leaving the remedy to the government's discretion. The mixed ruling gave a little something to each side, confirming the federal government's jurisdiction over foreign affairs while underscoring the serious violation of Khadr's rights. The Minister of Justice expressed the federal government's satisfaction with the ruling and promised to consider any next steps. End summary.

TO SEEK REPATRIATION OR NOT

¶2. (U) The Supreme Court of Canada issued a succinct and unanimous 19 page written ruling on January 29 in the case of Canadian citizen Omar Khadr (reftels), detained at Guantanamo Bay while facing allegations that he had killed a U.S. soldier in Afghanistan in 2002. The judgment followed an expedited hearing on November 13, 2009 of the federal government's appeal of an August 14, 2009 Federal Court of Appeal ruling that had ordered the government to request Khadr's repatriation from U.S. custody. The government had argued that courts lacked jurisdiction to direct the executive branch to act in the conduct of foreign relations. Khadr's lawyers had argued that Canadian officials' complicity in the violation of his constitutional rights was an extraordinary circumstance that demanded an unprecedented remedy, e.g., that the government intercede with U.S. authorities to request his repatriation. The full verdict is at:
<http://www.scc-csc.gc.ca/decisions/Khadr-en.p> df

FOUR KEY ISSUES

¶3. (U) In its January 29 ruling the Supreme Court addressed four issues:

-- whether the Canadian Charter of Rights and Freedoms applies to the conduct of Canadian officials alleged to have breached Khadr's constitutional rights;

-- whether the conduct of Canadian officials deprived Khadr of his right to liberty and security of the person and, if so, whether this deprivation conformed to principles of fundamental justice;

-- whether the repatriation remedy for Khadr was just and appropriate in the circumstances; and,

-- the power of the courts to review and intervene on matters of foreign affairs to ensure constitutionality of executive action.

CLEAR VIOLATION OF CONSTITUTIONAL RIGHTS

¶4. (U) In its judgment, the Supreme Court unequivocally confirmed violations of Khadr's constitutional rights, reaffirming its separate 2008 ruling that Canadian officials had breached Khadr's right to life, liberty, and security of the person under Section 7 of the Canadian Charter of Rights and Freedoms by interrogating him at the Guantanamo Bay facility in 2003 and 2004 and by sharing information from those interviews with U.S. authorities despite knowing that in 2004 that U.S. authorities had subjected him to illegal interrogation methods, including sleep deprivation. It further found that his status as a minor, his detention without counsel, and his interrogators' awareness that he had been subjected to sleep deprivation were "not in accordance with the

principles of fundamental justice." The Supreme Court added that the conduct of Canadian officials in these interrogations "offends the most basic Canadian standards about the treatment of detained youth suspects." Although these breaches of Khadr's rights had occurred in the past, the Supreme Court insisted that their impact "continues to this day."

REMEDY UP TO GOVERNMENT TO DECIDE

¶5. (U) The Supreme Court judged that Khadr was entitled to remedy, but concluded that the repatriation remedy ordered by the lower court did not meet the test of justice and appropriateness. It judged that the Federal Court of Appeal had "erred" in ordering the federal government to request Khadr's repatriation. It accepted the federal government's argument that the executive branch must have flexibility in exercising its royal prerogative (exclusive jurisdiction) over foreign affairs, and concluded that the Federal Appeal Court ruling had given too little weight to that constitutional responsibility. It commented that the effectiveness of the repatriation remedy was in any event "unclear" and that the court could not properly assess the impact of a repatriation request on Canadian foreign relations. It also deemed it "inappropriate" for a court to give direction as to the diplomatic steps necessary to address the breaches of Khadr's rights under the Charter. Finally, it cited "evidentiary uncertainties" posed by legal proceedings against Khadr before a U.S. military commission as a reason for the Canadian Supreme Court to exercise caution in exercising its remedial jurisdiction.

¶6. (U) The Supreme Court warned, however, that the government "is not exempt from constitutional scrutiny." Courts, it noted, had the responsibility "to determine the legal and constitutional limits within which such [executive] decisions are to be taken... in the case of refusal by a government to abide by constitutional constraints, courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution." The Supreme Court determined that the most appropriate remedy in this case was declaratory relief and decided "to grant Mr. Khadr a declaration that his Charter rights had been infringed, while leaving the government a measure of discretion in deciding how best to respond." It awarded costs to Khadr.

"END OF THE ROAD?"

¶7. (U) Nathan Whitting, one of Khadr's Canadian lawyers, told reporters that he was "not surprised" by the ruling, which "'cut down the middle." He appeared skeptical of the impact of the Supreme Court's declaration, stating that he did not expect a "mere declaration" that Khadr's rights had been breached would "make the PM budge" from his policy of non-intervention in the legal case against Khadr in the United States. "Practically speaking," he conceded, "this is pretty much the end of the road for [legal] assistance from the Canadian Government." He added that Khadr's Canadian lawyers would hereafter concentrate on U.S. military commission proceedings against his client.

¶8. (U) Official Opposition Liberal Party leader Michael Ignatieff underscored that the case was back in the political realm, arguing that the "ball is clearly in the government's court" and the "only thing it can't do is nothing." Ignatieff called on the government to "respect" the Supreme Court's ruling, which he said had clearly stated that Khadr's rights were violated, and to repatriate Khadr.

¶9. (U) Minister of Justice Rob Nicholson noted in a statement that "The Government is pleased that the Supreme Court has recognized the 'constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader interests'" and promised that "The Government will carefully review the Supreme Court's ruling and determine what further action is required." The full text of his statement is at: http://www.justice.gc.ca/eng/news-nouv/nr-cp/2010/doc_32474.html
JACOBSON